Petition

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

DR. REGINALD TIRU-CHELVAM
Petitioner,

v.

VETERANS' ADMINISTRATION HOSPITAL,
THE AMERICAN BOARD
OF INTERNAL MEDICINE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Is discriminatory motive or intent an essential element in the proof of a violation of Title 42, Section 1981 (1976) of the Civil Rights Act?

II.

Did the trial court and the court of appeals err in failing to find that Petitioner had established a prima facie case of discrimination under Section 1981?

III.

Did the United States Court of Appeals for the Fifth Circuit err in awarding attorneys' fees to Defendant?

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VETERANS' ADMINISTRATION HOSPITAL,
THE AMERICAN BOARD
OF INTERNAL MEDICINE, ET AL.,
Respondents.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Dr. Reginald Tiru-Chelvam, by his attorneys, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, filed on March 17, 1981, and the denial of a petition for rehearing filed on June 17, 1981.

OPINIONS BELOW

This action[1] was commenced in the United States District Court for the Southern District of Texas, Houston Division. Subsequently, all parties defendant, with the exception of the American Board of Internal Medicine (hereinafter "ABIM"), were dismissed and summary judgment was awarded Defendant

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[1]Formerly entitled Dr. Reginald Tiru-Chelvam, Plaintiff, v. J.J. Cox, Ind. and in his capacity as Director of the Veteran's Administration Hospital, The Veteran's Administration Hospital, The American Board of Internal Medicine, Dr. Saul J. Farber, Ind. and in his capacity as Chairman of the Board of the American Board of Internal Medicine, Dr. Robert G. Petersdorf, Ind. and in his capacity as Vice Chairman of the American Board of Medicine, Dr. John A. Benson, Jr., Ind. and in his capacity as Secretary-Treasurer of the American Board of Internal Medicine, and Dr. Henry D. McIntosh, Ind. and as a Representative of all other members of the Board of Internal Medicine, Defendants.

on June 30, 1980. The final judgment of the District Court is not officially reported but is reprinted at pages A-1 to A-7, infra. The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the lower court and dismissing the appeal was filed March 17, 1981, and is not officially reported but is reprinted at pages B-1 to B-4, infra. The Order Denying the Petition for Rehearing was filed in the United States Court of Appeals for the Fifth Circuit on June 17, 1981, and is reprinted at page C-1, infra.

JURISDICTION

The date of the opinion of the United States Court of Appeals for the Fifth Circuit, which is sought to be

reviewed, is March 17, 1981, which is also the date of its filing. A motion for reconsideration of that decision was denied by the United States Court of Appeals for the Fifth Circuit by an order dated June 17, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1981 of the Civil Rights Act of 1866, Title 42 U.S.C., Section 1981 (1976), provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

Title 28 U.S.C 52(a) provides:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for the purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. In an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Dr. Reginald Tiru-Chelvam, the Plaintiff-Petitioner, is a dark-complexioned citizen and native of the Indian sub-continent. He has an exceptionally distinguished medical background, and is a published authority in the field of internal medicine and its subspecialties. As a result of his international stature and knowledge, Dr. Chelvam was invited to join the staff of the Veteran's Administration Hospital in Houston, Texas, which is affiliated with Baylor University. Dr. Chelvam was a full-time member of the Baylor Medical School faculty with the academic rank of Clinical Assistant Professor of Medicine, with responsibilities for teaching clinical internal medicine to students of Baylor College of Medicine and was listed as such in its

directory. In addition, for a period in excess of three years, he was section chief of the detoxification ward at the Veteran's Administration Hospital, where he had broad patient experience in the area of general internal medicine. In the latter ward, which was uncontestedly dangerous, unpleasant, and overpopulated, Petitioner excelled due to his proficiency in the area of internal medicine. His performance and abilities were so outstanding, that when he gave notice of his intention to leave, the Petitioner was induced to remain by an appeal to his desire for accreditation by the ABIM as a specialist in internal medicine.

Defendant-Respondent ABIM has placed great emphasis upon the superficial formalistic requirements of the ABIM Plan C

Application Form and the fact that Plaintiff was unable to complete this form as the Board requires. In fact, it was precisely because of the arbitrary and discriminatory construction of Plan C that the Plaintiff was unable to complete the application. For it is explicitly set forth in the ABIM publication entitled Policies and Procedures:

> Specific recommendation that candidates be qualified under this Plan must be made by the Chairman of the Department of Medicine of an approved medical school in the United States or Canada. Candidates may not initiate an application for an examination involving Plan C. /emphasis in original/ at p. 14.

Petitioner never secured the recommendation of the Chairman of the Department of Medicine of Baylor University, Dr. Henry McIntosh, who was also a member of the governing board of the ABIM at the time that Petitioner's cause of action arose.

What had been an unconditional offer to sponsor the Petitioner as a candidate under Plan C for diplomate certification, was qualified and then withdrawn after Dr. Chelvam irrevocably changed position by agreeing to remain on the detoxification ward. A number of purely pretextual excuses were proffered to him, including his purported failure to pass a subjectively-graded clinical examination (a spot check procedure which is condemned by the ABIM in this context) and his failure to undertake a self-assessment examination (which is also rejected by ABIM guidelines) after he had been promised and then refused an opportunity and texts to study for it. Thereafter, Petitioner's overall performance in the area of internal medicine at the Veteran's Hospital was awarded the highest possible rating! Similarly,

Respondent may not validly object that Petitioner failed to make timely application, since at all times after 1971 he continued to express his desire to become Board certified and it was entirely due to the obstruction of its agents and the arbitrary architecture of the Plan itself that his ambition was frustrated. It is not disputed that certification by the Board of Internal Medicine is economically valuable and professionally important and even vital to those physicians who aspire to excellence in this field. Respondent stresses that Plan C is facially neutral. Nevertheless, the sine qua non for admission is a specific recommendation of a single individual in a medical school which has been approved by the American Medical Association, the parent body of Respondent ABIM. The only review pro-

cedure appears within the context of a description of admission procedures applicable to those who have fulfilled their residency training programs in American or Canadian-approved institutions under Plans A or B. This review procedure would not have been available to Petitioner nor was Petitioner ever aware of the availability of such a procedure. Would-be candidates under Plan C have no standing before the Board, whatsoever, until they are recommended in this fashion.[2] Petitioner has adduced

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[2]It should be noted that the law license of Petitioner's last attorney was cancelled as a result of a number of cases initiated against him by the Texas Bar Association, Grievance Committee by order of the Supreme Court of Texas on March 3, 1981. In the last stages of the District Court proceedings, Mr. Rosenblum agreed to dismiss all Defendants but the ABIM, signed a number of stipulations and agreed to submit the case on the Pleadings, Record,

statistical evidence substantiating the microscopic screening process of Plan C, whereby almost 90% of the foreign medical graduates, the vast majority of whom are similarly dark-complexioned, fail to become accredited. Petitioner correctly imputes this failure to the discriminatory nature of Plan C.

Question One

Is discriminatory motive or intent an essential element in the proof of a violation of Title 42, Section 1981 (1976) of the Civil Rights Act?

Question Two

Did the trial court and the court of appeals err in failing to find that Petitioner had established a prima facie case of discrimination under Section 1981?

Stipulations of Fact, and Exhibits, after unsuccessfully requesting a continuance of the trial setting and admitting that he was unprepared for trial.

ARGUMENT AS TO QUESTIONS ONE AND TWO

The decision of the United States Court of Appeals for the Fifth Circuit which dismissed the appeal of Petitioner from the judgment of the United States District Court for the Southern District of Texas, Houston Division, should be reviewed by this Honorable Court with respect to Title 42 U.S.C. §1981, in order to settle with finality the question of whether a prima facie case of racial discrimination under this section also requires proof of a discriminatory purpose.

By certifying this question, this Court may reconcile the diverse interpretations of the Circuits.[3]

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[3] A number of United States District Courts and some United States Circuit Courts of Appeals have concluded that §1981 requires proof of discriminatory intent. e.g. City of Milwaukee v. Saxbe, 546 F.2d 693, 705 (7th Cir. 1976);

Title 42 U.S.C. §1981 was originally enacted as a part of Section 1 of the Civil Rights Act of 1866 pursuant to Section 2 of the Thirteenth Amendment.[4]

Mescal v. Burrus, 603 F.2d 1266, 1270-71 (7th Cir. 1979); Williams v. DeKalb County, 582 F.2d 2 (per curiam), modifying 577 F.2d 248 (5th Cir. 1978). Others have arrived at an opposite conclusion, notably Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979); Richardson v. Pennsylvania Department of Health, 561 F.2d 489 (3rd Cir. 1977); Rule v. Bridge Workers Local 396, 568 F.2d 558, 564 (8th Cir. 1977); Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 838 n.22 (D.C. Cir. 1977).

[4]U.S. CONST. amend. XIII, §2.:
"Section One. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
"Section Two. Congress shall have the power to enforce this Article by appropriate legislation."

Originally, the Court limited the application of Section 1981 to cases involving government-imposed discrimination and the perpetuation of slavery construed in its narrowest sense.[5] However, in 1968, this Court extended §1982, which is similarly derived from §1 of the Civil Rights Act of 1866 to prohibit private conduct as well as state action which resulted in racial discrimination, holding that §1982 "must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed. 2d 1184 (1968).

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[5]See, e.g. The Civil Rights Cases, 190 U.S. 3, 16-17 (1883).

Nevertheless, the decision did not suggest the indicia of motivation, nor was the question presented as to proof of impact versus intent under §1981. Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) prohibited race discrimination in private schools. According to the majority decision in Runyon, "/A/ Negro's §1 right to 'make and enforce contracts' is violated if an offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter contracts as he extends to white offerrees." 427 U.S. at 170-71 (citations omitted). As a result of sweeping extensions of the act to all forms of public and private conduct, there are few areas which may be considered exempt from the implications of §1981. The Court noted the divergence

between §1981 and Title VII of the Civil Rights Act of 1964 in Johnson v. Railway Express Agency, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), in which the causes of action were observed to be separate, distinct, and independent.

In Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court held that a showing of racially discriminatory effect by itself is sufficient to prove a prima facie case under Title VII. Thereafter, lower courts upheld findings that a facially neutral employment practice had a disproportionate adverse racial impact. These conclusions were reached by means of statistical evidence unalloyed with considerations of Defendant employers' intent, in order to establish Plaintiffs' prima facie case. The "effects" test was

then extended to a great number of cases arising under other titles of the Civil Rights Act.

However, in Washington v. Davis 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), this court articulated a rule that in order to establish a prima facie case of racial discrimination under the Fifth Amendment, a Plaintiff must prove intentional or purposeful race discrimination. 426 U.S. at 238-42. Petitioner seeks to distinguish the result in Washington from the facts of the instant case. In the former controversy, there is a challenge to the employment practices of the District of Columbia and Metropolitan Police Department by two blacks whose applications to become police officers had been rejected. The Plaintiffs therein based their claim on the Equal Protection

component of the Due Process Clause of the Fifth Amendment, §1981, and a District of Columbia Statute. It is urged herein that this Court decided only the constitutional standard under the Fifth Amendment and neither considered nor decided the appropriate standard of proof for a prima facie case under §1981. Moreover, it is urged that since the Court in Washington considered the adequacy of the Defendants' evidence regarding the validity of the test in question in relation to Plaintiffs' statutory claims, this Court must have determined that Plaintiffs had sustained the burden of establishing a prima facie case of race discrimination under §1981 or the District of Columbia Code. Thus, since the only evidence adduced by Plaintiffs concerned the disproportionately adverse impact of the test,

by implication the decision in Washington supports the reasoning that Plaintiffs need only prove disproportionate impact to establish a prima facie case under the statutes. Moreover, the cases of Washington and the more recent City of Memphis v. Greene, _____ U.S. _____, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981), concerned state rather than private action. The Court in Washington expresses concern that if the showing of disproportionate racial impact is sufficient for Plaintiffs to prevail under §1981 the results "would be far reaching and raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the poor or average black than to a more affluent white." 426 at 248. The Court also expressed

alarm that an application of the "impact" standard might invalidate tests and qualifications for voting, draft deferments, jury service, and government-conferred benefits, as well as such things as sales taxes, bail schedules, utility rates, bridge tolls, license fees, minimum wage laws, and usury laws. 426 at 248 n. 14. There is no public policy reason for requiring that purely private conduct which has a racially discriminatory impact be subject to the same strictures and proof of intent or motive to discriminate as state action.

In Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), this Court recognized that official decisions are influenced by multiple factors and did not require the Plaintiff to prove

that discrimination was the government's exclusive, dominant, or even primary motivation. Rather, the tribunal held that the Plaintiff need only show that discriminatory purpose was "a motivating factor." 429 at 265-266. The Court listed five criteria, including historical background, immediately preceeding events, a departure from standard operating procedure or consideration of substantive factors usually employed, and the legislative or administrative history behind the decision's discriminatory impact. Nevertheless, this Court did indicate that proof of disproportionate impact will be sufficient only where the exclusion is disproportionately egregious. 429 at 266. After Arlington, in all the reported cases wherein the Court applied the Washington and Arlington formulas for proving intent

under §1981, only one Plaintiff actually prevailed. Pennsylvania v. Local 542 International Union of Operating Eng'rs., 469 F.Supp. 392 (E.D. Pa. 1978). Petitioner would distinguish City of Memphis v. Greene, supra, which concerned an alleged violation of 42 U.S.C. §1982 and the Thirteenth Amendment, and involved the closing of a street to traffic in a manner than created a barrier between black and white neighborhoods. The majority, in a fashion that was criticized by Justice White in his concurring opinion, reviewed the entire record, reversing the Sixth Circuit's findings of discriminatory intent and detrimental impact. The Court stressed the balancing of interests, "Therefore, as applied to this case, the threshhold inquiry under §1982 must focus on the relationship be-

tween the street closing and the property interests of the Respondents," at 1598. The Court's inquiry into the city's intent parallels this approach: "The interests motivating the city's action are thus sufficient to justify an adverse impact...," 101 S.Ct. at 1600. Justice White, alone, imported proof of intentional discrimination into the Thirteenth Amendment and §1982. Thus Petitioner submits that this Court has, as yet, not enunciated the standards of proof necessary under the Thirteenth Amendment and §1981. Justice Rehnquist, in his dissent to Columbus Board of Education v. Penick, _____ U.S. _____, 99 S.Ct. 2941 (1979) observed that the Court had not resolved its "still incomplete articulation" of the discriminatory purpose requirement in a disproportionate impact case. 99 S.Ct. at 2958.

Petititioner has demonstrated that there is no factual basis for requiring a different procedure in the certification or eligibility determination of foreign, vis a vis United States and Canadian trained physicians. There are no uniform procedures for measuring the quality of care nor the medical qualifications of foreign medical graduates, a vast majority of whom are dark-complexioned like Petitioner. Such foreign graduates have been ghettoized and relegated to providing health care in public hospitals where foreign medical graduates representing racial minorities treat patients who also represent minorities. By providing a substrata of professionals who assume the most difficult, problematic and intensive responsibilities, caring for the medically, socially, and

racially disadvantaged, the remaining medical practitioners, who are disproportionately white, may engage in lucrative private practice, caring for patients who are also white. Plan C reflects a purposeful and intentional effort by Defendant ABIM to perpetuate this segregation of doctors and their patients. "Because of the covert nature of modern race discrimination and of the wide-spread reliance on facially neutral policies and practices, proof of intentional discrimination is not easily established," Heiser, Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. §1981, 16 San Diego L. Rev. 207, 221 (1979).

In Jones v. Mayer, supra, the Supreme Court equated the exclusion of blacks from

white communities and the herding of men into ghettos with the more overt forms of discrimination codified in the Black Codes. Id. at 443. Thus, §1981 should be construed liberally to erradicate these subtle forms of discrimination which impose "badges and incidents" of slavery in a fashion as economically and socially devastating as the more explicit legislation enacted during the Reconstruction Era. The public policy argument in Washington, supra, against a broad "impact" interpretation of §1981, is especially inapplicable in the instant case. Plan C is shot through with arbitrary and capricious standards or procedures, which may result in exactly the same form of abuse as that experienced by Petitioner. It has never been shown objectively that the professional qualifications of foreign medical graduates are

inferior to those of U.S. medical graduates; it has never been shown that professional standards would be protected by requiring sponsorship of the Chairman of the Department of Medicine in which a would-be candidate is teaching; it has never been shown that there is any relationship between professional qualifications and the limitations of would-be candidates who are even within a potential group circumscribed by Plan C. Petitioner submits that before the inception of Plan C the Defendant Board foresaw and even desired the highly arbitrary, capricious, and racially exclusionary manner in which this Plan is implemented. Petitioner suggests an analogy with a hypothetical voting rights case in which the exercise of that right were to be conditioned upon qualifications that were

not demonstrably related, which conditions segregated a protected minority, and which conditions at the very outset predicated the right to vote upon the subjective and unreviewable evaluation of a single individual who is not a member of that minority. Clearly, a law that says "No one may vote except those whom I select," is facially neutral, but so arbitrary and capricious in its effectuation as to be implicitly invalid.

Thus, even if petitioner's argument that Plan C was devised with the intent and motive of discriminating against racial minorities fails, the disproportionate impact coupled with its completely arbitrary and subjective administration, should invalidate it under §1981. Neither should the ABIM, by reference to untested means of insuring professional

standards, be allowed to arrogate to itself a quasi-public function and status entailing the public policy rationale of Washington. The ABIM may be a non-profit organization, but that term is not descriptive of the members of its governing board nor the diplomates whom it certifies. This case is more analogous to Richardson v. Pennsylvania Department of Health, 561 F.2d 489 (3d Cir. 1977), in which a black woman alleged violations of 42 U.S.C. §§1981 and 1983, and of the Fourteenth Amendment as a result of her improper discharge of employment after she failed to be placed on an eligibility list as a result of an examination which she claimed was not job-related. The Third Circuit Court of Appeals, in over-ruling the lower court's granting of Defendant's Rule Twelve (b)(6) motion

took cognizance of the discriminatory impact on minority job applicants:

> She charges that the Defendants knew that the selection procedures (the exam and its scoring) have a discriminatory impact on minority job applicants and that it was not job-related. She also charges that the Defendants used these procedures knowing that she had 9 and 1/2 years of successful performance on the job that they acted with knowledge that use of the test would violate her constitutional rights, and that they acted 'in bad faith'. She is entitled to the opportunity to offer proof that the 'bad faith' referred to was an intentional and purposeful discriminatory intention in using the test....

Richardson also suggests that the holding in Washington, requiring a showing of discriminatory intent, is limited to cases based on the Fifth or Fourteenth Amendments:

> She urges that 42 U.S.C. §1981, having its separate genesis in the Civil Rights Act of 1866, should be construed consistently with Title VII, since like that Title, it is a statutory grant of substantive and remedial rights,

> rather than a remedy for the enforcement of minimum constitutional requirements. ... If she proves no more than disparate impact, the District Court initially, and we, on a full record, can consider the §1981 issue when it must be decided. 561 at 492-493 (citations omitted).

In Davis v. County of Los Angeles, 566 F.2d 1534 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979), the Ninth Circuit Court of Appeals determined that the Washington decision did not impose the requirement of proof of discriminatory motive or intent in cases arising under §1981 against government employers. The facts in Davis concern minority applicants for firefighters' positions in a department which has in the past practiced overt discrimination and which at present failed to take any remedial action. The Court of Appeals affirmed the District Court's finding that a

written test was invalid as not being job-related and overruled the lower court's conclusion that a height requirement which eliminated 41% of Hispanic applicants was a pertinent qualification. Judge Tuttle, writing for the Circuit, limited the requirement of proof of discriminatory intent to the Equal Protection Clause of the Fourteenth Amendment. In insisting upon the alignment of proof between Title VII and §1981, Judge Tuttle observed:

> Any unnecessary deviation not only could produce undesirable law conflicts ... but also would dilute what has been a potent remedy for the ills of countless minority employees subject to the unlawful discriminatory conduct of their employers...

552 F.2d at 1340 (citation omitted). In United Black Firefighters of Norfolk v. Hirst, 604 F.2d 844 (4th Cir. 1979), an organization of black firefighters alleged

that the city council had enacted laws which affected the department and discriminated against the organization and its minority members, under Title VII and §§1981 and 1983. In affirming dismissal of the complaint for want of timely filing with the Equal Employment Opportunity Commission, the Fourth Circuit Court of Appeals considered whether:

> /A/n allegation of racially disproportionate impact states a cause of action /under §1981/. We do not read Johnson v. Ryder Trucklines /citation omitted/ and Sledge v. J.P. Stevenson Company, Inc. /citation omitted/, as holding that a Plaintiff may maintain a §1981 action without proof of discriminatory intent. The question is open in the Fourth Circuit and we decline to decide it on the unsatisfactory record presented to us. The three employees-plaintiffs assert racial motivation in denials of promotions. Although this is not an allegation of discriminationatory intent, we believe that it suffices to state a claim

> under §1981... Washington v. Davis, supra, refers to proof of discriminatory intent. We do not know whether such proof will be forthcoming in the instant case... 604 at 848.

The ambit of Section 1981, which should encompass members of protected minorities seeking to enjoy freedom of contract ought not to be amputated. Even if this Court should determine that §1981 must be strangled by the strictures of intent and motive due to the public policy arguments enunciated in Washington, Arlington, and City of Memphis, supra, the same rationale should not apply in cases of purely private conduct like the instant case.

The District Court's finding in the instant case of no discriminatory motive or intent was clearly erroneous due to the additional element of the

arbitrary selection of candidates who fit the qualification under Plan C. Because of the extreme susceptibility of that Plan to abuse due to the subjective selection methods inherent therein, it is impossible to conclude that the policy is facially neutral. Moreover, even if no discriminatory motive or intent is inferred from Defendant's policies and procedures, the District Court erred in dismissing Petitioner's claim for failure to establish a prima facie case. Section 1981 has not yet been interpreted by this Honorable Court in such a way that motive and intent must be established by Plaintiff before the burden of going forward shifts to the Defendant.

"Rule 52(a) of the Federal Rules of Civil Procedure requires appellate courts to accept district court findings of fact unless clearly erroneous. A finding of

fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'", Ramirez v. Sloss, 615 F.2d 163 (5th Cir. 1980), citing United States v. United States Gypsum Co., 333 U.S. 364, 365 (1948).

In Columbus Board of Education v. Penick, supra, Justice Rehnquist observed in his dissent that discriminatory purpose is a "highly mixed question of law and fact," and should be subject to review at the appellate level, 99 S.Ct. at 2953-54.

Question Three

Did the United States Court of Appeals for the Fifth Circuit err in awarding attorneys' fees to Defendant?

ARGUMENT AS TO QUESTION THREE

Even if this petition should fail, Petitioner urges that attorneys' fees should not be taxed against him on appeal as awarded by the United States Court of Appeals for the Fifth Circuit.

The award of attorneys' fees to Defendants in civil rights actions may be made " ... upon a finding that the Plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith," Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421; 98 S.Ct. 694, 700; 54 L.Ed.2d 648 (1978). Christianburg thus overruled United States v. Allegheny-Ludlum Industries, Inc., 558 F.2d 742 (5th Cir. 1977), " ... that the same standards should apply to both plaintiffs and defendants in award of

attorneys' fees under Title VII, and we allow defendants to recover as prevailing parties almost as a matter of course. The Supreme Court in Christianburg Garment, however, established a double standard for attorneys' fees awards," Crawford v. Western Electric Co., Inc., 614 F.2d 1300, 1321 (5th Cir. 1980). "While this double standard can be criticized as promoting a proliferation of civil rights litigation by failing to provide an adequate disincentive to minor or insignificant claims, it is clearly supported by both the specific legislative history and overall congressional purposes behind the Award Act," 80 Columbia L. Rev. 346 (1980), at 352. "An attempt by Senator Bumpers to eliminate the double standard was defeated by

the Senate, 122 Cong. Rec. 31, 792 (1976)", note 54, loc. cit.

Plaintiff submits that in every case where the extraordinary remedy of the award of the attorneys' fees to defendants was granted, it was either because of an outrageous course of multiple litigation or dilatory tactics to avoid the payment of judgment or to arrest lawful governmental procedures, or else as in the Christianburg case was an award against the EEOC.

" ... the image of the lone individual facing a corporate power is giving way to a more equal confrontation between a powerful government agency and business. A standard which comprehends this change and embodies a more equitable basis for awarding attorneys' fees to prevailing defendants is justified especially when

the EEOC is the filing party." 47 Cincinnati L. Rev. 318, 324 (1978). (EEOC v. First Alabama Bank of Montgomery, 595 F.2d 1050 (5th Cir. 1979) is an additional example.)

Although in Harris v. Plastics Manufacturing Co., 617 F.2d 438 (5th Cir. 1980), the Fifth Circuit affirmed that the District Court did not abuse its discretion in awarding attorneys' fees to the employer in an action based on 42 USCA §§2000e et seq., Petitioner's cursory three-page appellate brief contained no arguments supporting the first point of appeal. In Sierra v. Datapoint Corporation, 459 F. Supp. 668 (1978), the Plaintiff had relitigated issues which had been thoroughly investigated and which were the subject of a settlement agreement. Moreover, it was one of a

series of multiple lawsuits filed by plaintiff for the sole purpose of causing her former employer expense and inconvenience, at 672. In Monroe Auto Equipment Co. v. NLRB, 511 F.2d 611 (5th Cir. 1975), a federal action was seen as an attempt by the employer to seek a federal forum where there was no jurisdiction, in derogation of the union's rights. In Self v. Self, 614 F.2d 1026 (5th Cir. 1980), in an action against her ex-husband, an ex-wife sought removal to federal court of an action over which it patently lacked jurisdiction. In Dow Chemical Company v. M/V Gulf Seas, 593 F.2d 613 (5th Cir. 1979), the Fifth Circuit pointed out that "an appeal is not patently frivolous merely because the trial court is affirmed," at 614. The Petitioner, in the instant action,

does not seek to obstruct any lawful private or governmental procedures nor pervert the course of justice. Thus, the great and onerous penalty against him is anomalous and not warranted by the facts or legal precedents.

CONCLUSION

There is presently a disparity among the Circuits with regard to the proof necessary to constitute a prima facie case under Title 42 U.S.C. §1981, an issue which this Court has never specifically addressed. Even if Petitioner has failed to show that the arbitrary and capricious construction and application of Plan C, coupled with its vastly disproportionate impact upon foreign-educated minority physicians, does not constitute proof of a motive or intent

to discriminate on the part of Respondent ABIM, Petitioner urges that the disproportionately adverse impact alone upon such minority physicians, in the absence of any objective standards and correlations between the procedures of Plan C and the ends it seeks to serve, constitutes a prima facie case under §1981. Moreover, public policy considerations which compelled the Court to use restraint in the cases of Washington, Arlington, and City of Memphis should not apply in an instance of purely private conduct.

Petitioner should not be taxed attorneys' fees for pursuing an action in good faith to vindicate his civil rights. This cause and the appeals thereof have been brought without the intention or effect of impeding valid court orders or depriving others of fundamental justice.

Respectfully submitted,

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CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 30 1980
JESSE E. CLARK, CLERK
BY DEPUTY: P Robinson

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DR. REGINALD TIRU-CHELVAM, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 76-H-1011
VETERANS ADMINISTRATION HOSPITAL, ET AL., Defendants.	)	

FINAL JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered herewith, it is

ORDERED, ADJUDGED, and DECREED that Plaintiff take nothing by this action against the American Board of Internal Medicine or its Board Members, The Veterans Administration Hospital, and Dr. Henry D. McIntosh. Costs of this action are to be taxed against the Plaintiff.

SIGNED and ENTERED this 30th day of June 1980.

GEORGE E. CIRE
UNITED STATES DISTRICT JUDGE

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 30 1980
JESSE E. CLARK, CLERK
BY DEPUTY:

A-2

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

DR. REGINALD TIRU-CHELVAM, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 76-H-1011
VETERANS ADMINISTRATION HOSPITAL, ET AL., Defendants.	)	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter has been submitted to the Court on motions by Plaintiff Reginald Tiru-Chelvam and Defendant American Board of Internal Medicine for judgment on the pleadings. Defendants Veterans Administration Hospital and Dr. Henry D. McIntosh have been dismissed from this action by stipulation with the Plaintiff pursuant to Rule 41(a)(1), FED.R.CIV.P. Having reviewed the entire record consisting of the pleadings, stipulations, depositions, exhibits and legal memoranda, the Court now enters the following as its Findings of Fact and conclusions of Law.

Findings of Fact

1. Plaintiff Reginald Tiru-Chelvam, M.D., is a Malaysian Oriental naturalized citizen and a resident of Houston, Texas.

2. Defendant American Board of Internal Medicine is a non-profit organization which administers a program of certifying physicians for specialist status in the field of internal medicine. Certification by Defendant is voluntarily recognized by members of the medical profession and it is valuable to a physician in the field of internal medicine in the academic community.

3. Defendant is not an employer or agent of any employer of the Plaintiff.

4. In 1971, Plaintiff requested information from the ABIM concerning certification and shortly thereafter, the ABIM advised Plaintiff of the requirements for certification and advised him that, in addition to his then-current credentials, he needed a minimum of 24 months of approved formal training in the broad field of internal medicine with primary patient responsibility.

5. Since 1971, Plaintiff has not been in any approved formal training program such as an internship, residency, or fellowship.

6. Plan C of the ABIM Policies and Procedures provides an opportunity for certification in internal medicine to medical doctors who are foreign educated and trained or who did not engage in the traditional route of training and have the abilities and stature to qualify for admission to the certifying examination even though their training program may have been unusual.

7. Recommendation to sit for the certifying examination in internal medicine under Plan C of the ABIM Policies and Procedures must be made by the Chairman of the Department of Medicine of an approved medical school in the United States or Canada.

8. A minimum of 36 months postdoctoral training in internal medicine is required for certification by Defendant ABIM under Plan C.

9. Certification of clinical competence is required of all candidates for certification by Defendant ABIM.

10. Plaintiff was employed at the Veterans Administration Hospital in Houston, Texas, as a staff physician from 1971 to November 24, 1975.

11. Plaintiff was appointed to the Faculty of Baylor College of Medicine as Clinical Assistant Professor of Medicine for the period 1971-1975. Plaintiff has never received any monetary compensation from Baylor College of Medicine.

12. Candidates for certification under Plan C must be full-time members of the faculty of a school of medicine in the United States or Canada.

13. In his 1974 Application for Admission for Examination submitted to ABIM, Plaintiff stated that he was a part-time appointee at Baylor College of Medicine. This was the only application ever submitted by Plaintiff to the ABIM.

14. A part-time faculty appointment at an accredited medical school in the United States or Canada does not fulfill the ABIM's requirement of "full-time member of the faculty of a medical school" for purposes of eligibility under Plan C for admission to the Certifying Examination.

15. Henry D. McIntosh, M.D., was chairman of the Department of Medicine at Baylor College of Medicine in 1974-1975.

16. While employed at the Veterans Administration Hospital, Plaintiff worked on Ward 310, the Alcoholic and Detoxification Ward, under the auspices of the Department of Psychiatry.

17. In 1974, Ward 310 was transferred to the Department of Medicine, Medical Service, under the supervision of Robert J. Luchi, M.D., Chief of Medical Service. On July 15, 1974, Plaintiff advised Dr. Luchi by letter that he would not resign but would stay with the V.A. Hospital for another year and avail himself of additional experience in internal medicine in order to qualify for eligibility to sit for the ABIM certification examination.

18. No one from the V.A. Hospital had authority to recommend Plaintiff to sit for the ABIM examination.

19. In January 1975, Plaintiff examined two patients on Medical Service at the V.A. Hospital. These examinations were supervised and evaluated by Glenn R. Cunningham, M.D., and Richard D. Borreson, M.D., both of whom are certified by the ABIM as specialists in internal medicine. Reports by Doctors Cunningham and Borreson to Dr. Luchi concerning the Plaintiff's performance and clinical competence were unfavorable to the Plaintiff.

20. After having reviewed these evaluations, Dr. McIntosh declined to attest to the ABIM under Plan C to the Plaintiff's clinical competence in the broad field of internal medicine.

21. Plaintiff did not take the self-assessment examination in internal medicine prepared by the American College of Physicians. The results of this examination would have been helpful to Dr. McIntosh in assessing the extent of Plaintiff's cognitive knowledge of the total field of internal medicine.

22. Plaintiff had the opportunity to take this self-assessment examination.

23. Dr. McIntosh did not recommend the Plaintiff to sit for the ABIM certification examination because the Plaintiff had not demonstrated that he was qualified for certification and prepared to take the examination in the areas of clinical competence and cognitive understanding of the broad field of internal medicine.

24. Dr. McIntosh's decision not to recommend the Plaintiff to the ABIM was in no way improperly motivated by considerations of race, color, alienage, or national origin.

25. Defendant ABIM returned Plaintiff's application for admission to the certifying examination in December 1974. Plaintiff's application was returned because his application showed that he did not meet the ABIM's requirement of 36 months of approved formal training in internal medicine.

26. The ABIM's failure to approve the Plaintiff's application was in no way improperly motivated by considerations of race, color, alienage, or national origin.

27. Defendant ABIM's policies and procedures for certification and for eligibility for the certification examination are fair, regular, and neutral on their face and the preponderance of the evidence does not establish that they are discriminatory in operation. The ABIM was not discriminatorily motivated in devising Plan C.

Conclusions of Law

1. Plaintiff asserts a claim under the Civil Rights Act of 1870, 42 U.S.C. §1981, based upon the allegation that he was wrongfully denied sponsorship and an opportunity to take the examination for certification by the Defendant ABIM due to its discriminatory policy against individuals whose national origins are such that they are dark-complected.

2. Allegations of discrimination based solely upon national origin are not cognizable under 42 U.S.C. §1981. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). See Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). The Fifth Circuit has extended the coverage of §1981 to include discrimination on account of citizenship. Guc[illegible] v. Manchester, 498 F.2d 641 (5th Cir. 1974). This Court has jurisdiction

over the Plaintiff's §1981 claim to the extent that it asserts that his color or citizenship was a factor in the discrimination alleged to be violative of §1981. See Patel v. Holley House Motels, 483 F.Supp. 374 (S.D.Ala. 1979).

3. A Plaintiff must make a showing of purposeful discrimination before casting the burden on the Defendant to rebut a charge of discrimination under 42 U.S.C. §1981. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978).

4. Plaintiff has failed to establish a prima facie case of discriminatory purpose on the part of Defendant ABIM or Veterans Administration Hospital or Dr. Henry McIntosh.

5. Plaintiff is not entitled to any form of relief by reason of this action.

6. This Court does not find that this action was brought in bad faith and, therefore, declines to assess the Defendant's attorney's fees against the Plaintiff.

SIGNED and ENTERED this 30th day of June 1980.

GEORGE E. CIRE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUL 30 1980
JESSE E. CLARK, CLERK
BY DEPUTY: M. Cozier

DR. REGINALD TIRU-CHELVAM, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 76-H-1011
VETERANS ADMINISTRATION HOSPITAL, ET AL., Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Dr. Reginald Tiru-Chelvam plaintiff above named hereby appeals to the Court of Appeals for the Fifth Circuit from that part of the final judgment entered in this action on the 30th day of June, 1980, in favor of the Defendants, the American Board of Internal Medicine and it's Board Members, and against the Plaintiff, Dr. Reginald Tiru-Chelvam.

HENRY M. ROSENBLUM
ATTORNEY FOR APPELLANT
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TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk
By Mildred Cozier
Deputy

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

DO NOT PUBLISH

No. 80-1820
Summary Calendar

DR. REGINALD TIRU-CHELVAM,

Plaintiff-Appellant - Cross-Appellee,

versus

VETERANS ADMINISTRATION HOSPITAL, ET AL.,

Defendants,

THE AMERICAN BOARD OF INTERNAL MEDICINE,

Defendant-Appellee-Cross Appellant.

Appeals from the United States District Court for the Southern District of Texas

(MARCH 17, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

Reginald Tiru-Chelvam is a Malaysian-born physician who received his medical training in Great Britain. He filed a complaint against the American Board of Internal Medicine charging that the Board had violated Title VII of the Civil Rights Act and 42 U.S.C. section 1981.[1/]

The Board is a non-profit organization which certifies doctors as specialists in the field of internal medicine.

Dr. Tiru-Chelvam alleged that the Board had discriminated against him by requiring that his qualification for certification be made under the terms of the Board's so-called "Plan C" certification procedure. Plan C provides the only means by which doctors who did not follow the ordinary course of American university and medical school training may qualify for certification. It requires, inter alia, that the foreign-educated physician seeking certification be a faculty member at an American medical school, that he be recommended by the chairman of the school's department of internal medicine, and that he successfully complete an examination before he can be certified as a specialist in internal medicine. Dr. Tiru-Chelvam applied to the Board for permission to sit for the 1974 certification examination but the Board refused to accept his application.

At trial, Dr. Tiru-Chelvam adduced statistical evidence purporting to demonstrate Plan C's disproportionate impact on "dark-complected" doctors. The crux of the argument was that Plan C was a "cleverly devised" process by which non-white doctors were denied certification as specialists. The district court held, however, that there could be no violation of section 1981 without a demonstration of discriminatory intent. The court ruled that Dr. Tiru-Chelvam had produced no evidence from which such intent could be inferred, and granted summary judgment in favor of the Board.

We affirm the trial court's entry of summary judgment. The intent requirement under section 1981 is established law in this circuit. See, e.g., Ramirez v. Sloss, 615 F.2d 163, 168 n.8 (5th Cir. 1980). This panel has no authority to adopt Dr. Tiru-Chelvam's suggestion that we abandon this precedent.

We also reject Dr. Tiru-Chelvam's assertion that discriminatory intent can be inferred from the evidence he presented to the district court. Even under the five-part test Dr. Tiru-Chelvam distills from Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-28, 97 S.Ct. 555, 563-65, 50 L.Ed.2d 450,

___ - ___ (1977), evidence of discriminatory intent is clearly lacking. The statistical evidence cited by Dr. Tiru-Chelvam fails to account for such vital factors as the number of foreign-educated doctors who applied for Board certification and the quality of foreign medical education in relation to American medical education. It thus is wholly inadequate to demonstrate disproportionate impact, the first prong of the Arlington Heights test. The evidence submitted by Dr. Tiru-Chelvam in support of the other four elements of inferred discriminatory intent — historical background, specific antecedent events, departure from normal procedures, and contemporary statements — consists of self-serving conclusory assertions or irrelevant actions by former defendants. Dr. Tiru-Chelvam has not even approached the quantum of proof required for prima facie evidence of discriminatory intent.

The Board argues that Dr. Tiru-Chelvam's case is frivolous and asks this court to award it attorneys fees. We do not agree that the action was frivolous when it was initiated. However, after the other defendants were dismissed, the proof was attempted, and the district court ruled, nothing of substance remained. The appeal is frivolous. Under Federal Rule of Appellate Procedure 38 we award costs of the appeal to the appellees. We also award them just damages in the form of a reasonable attorneys fee for work done on this appeal. The amount of the fee shall be fixed by the district court on remand.

APPEAL DISMISSED.

FOOTNOTE

1/ Several doctors and the Veterans Administration Hospital in Houston were included as defendants in the original complaint. Charges against all defendants except the Board were dismissed voluntarily.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUN 17 1981
GILBERT F. GANUCHEAU
CLERK

UNIT A

NO. 80-1820

DR. REGINALD TIRU-CHELVAM,

Plaintiff-Appellant
Cross-Appellee,

versus

VETERANS ADMINISTRATION HOSPITAL,
ET.AL.,

Defendants,

THE AMERICAN BOARD OF INTERNAL
MEDICINE,

Defendant-Appellee
Cross-Appellant.

...RKS NOTE:
...RULE 41 STAYS AND LOCAL
...LE 17 FOR STAY OF THE
...ANDATE

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(JUNE 17, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Charles Clark
United States Circuit Judge

Opposition

Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-552

DR. REGINALD TIRU-CHELVAM,

Petitioner,

v.

VETERAN'S ADMINISTRATION HOSPITAL, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN BOARD OF INTERNAL MEDICINE IN OPPOSITION

A. J. HARPER II
NANCY MORRISON O'CONNOR
Counsel for Respondent, American Board of Internal Medicine

Of Counsel:

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in finding Petitioner failed to establish a *prima facie* case of unlawful discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976)?

2. Whether the Court below abused its discretion in awarding attorneys's fees on appeal to Respondent?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-552

DR. REGINALD TIRU-CHELVAM,

Petitioner,

v.

VETERAN'S ADMINISTRATION HOSPITAL, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN BOARD OF INTERNAL MEDICINE IN OPPOSITION

STATEMENT OF THE CASE

Dr. Reginald Tiru-Chelvam ("Petitioner") is a Malaysian Oriental naturalized citizen and a resident of Houston, Texas. He was graduated from West London Hospital Medical School, London, England, in 1960.

Respondent American Board of Internal Medicine ("Respondent" or "ABIM") administers a program of certifying physicians for specialist status in the field of internal medicine. Certification by Respondent is valuable to a physician in the field of internal medicine in the academic community. Certification by Respondent is purely voluntarily recognized by members of the medical profession.

In August 1971, Petitioner solicited information concerning certification from ABIM. In September 1971, advised Petitioner of the requirements for certification and that, in addition to his then-current credentials, he needed a minimum of 24 months approved additional formal training in the broad field of internal medicine with primarily patient responsibility. Petitioner did not appeal this assessment of his training deficiencies.

In its correspondence to Petitioner in 1971, Respondent advised Petitioner of all methods of applying for certification, including Plan C of Respondent's Policies and Procedures. Plan C provides an opportunity for medical doctors who are foreign educated and trained, or who did not engage in the traditional route of training and have the ability and stature, to qualify for admission to the examination even though their training program may have been unusual. Recommendation concerning the clinical competence of a candidate for the certifying examination in internal medicine under Plan C must be made by the Chairman of the Department of Medicine of an approved school in the United States or Canada at which the candidate for certification is a full-time faculty member. Certification of clinical competence is required of all candidates for certification by Respondent, regardless of which Plan the candidate elects to pursue. A minimum of 36 months' post-doctoral training in internal medicine is required for certification under Plan C.

Petitioner was employed at the Veterans' Administration Hospital, Houston, Texas, as a staff physician from 1971 through

November 24, 1975. While employed at Veteran's Administration Hospital, Petitioner worked on Ward 310, Alcoholic and Detoxification Ward, which accommodated patients who almost exclusively had a history of alcoholism. Ward 310 came under the auspices of the Department of Psychiatry until 1974 when it was transferred to the Department of Medicine, Medical Services.

In November 1974, Petitioner submitted an application to Respondent to take the June 1975 certification examination. This is the only application ever submitted by Petitioner to Respondent. In his application, Petitioner represented to Respondent that he was only a part-time faculty member at Baylor College of Medicine. Petitioner has never received any monetary compensation for his position of clinical assistant professor at Baylor College of Medicine. Petitioner left blank those portions of the application dealing with training and did not attach the requisite recommendation of clinical competence. In addition, the application submitted by Petitioner was submitted past the time completed applications were to be submitted to Respondent for consideration for the June 1975 certification examination.

Thus, Petitioner failed to file a timely or complete application with Respondent for the June 1975 certification examination. He lacked the requisite training and had been so notified in 1971. It is uncontroverted that he received no additional approved formal training since 1971. At the time Petitioner submitted his application in 1974, he was aware that he did not meet the minimal training requirements for certification. In addition, he was aware and admitted that he did not have a full-time medical school faculty appointment, as required under Plan C. Thus, at the time Petitioner sent his application to Respondent in 1974, he was aware that it was incomplete, untimely and that he unqualified both because of his training and because of his lack of fuli-time faculty status.

In December 1974, Respondent returned Petitioner's application because he lacked the requisite training. Petitioner had no further correspondence with Respondent and did not appeal Respondent's return of his application and/or assessment of his training deficiencies.

Petitioner never requested consideration for eligibility to take the certification examination under any plan other than Plan C. It is uncontroverted that a minimum of 36 months' post-doctoral training in internal medicine, a recommendation to sit for the examination by the Chairman of the Department of Medicine of an approved medical school and full-time faculty status at an approved medical school are prerequisites to eligibility to take Respondent's certification examination under Plan C. At the time of Petitioner's application to Respondent in 1974, Petitioner was aware he met none of these qualifications.

Nevertheless, in early 1975, Petitioner continued to seek his departmental chairman's recommendation to take the June 1975 examination under Plan C. Absent Petitioner's fulfilling the other requirements for eligibility to take the certification examination, this recommendation alone was useless to Petitioner. Henry D. McIntosh, M.D., then Chairman of the Department of Medicine at Baylor College of Medicine, arranged for evaluations of Petitioner's clinical competence in the broad field of internal medicine by R. E. Borreson, M.D., and Glenn R. Cunningham, M.D., Board certified physicians at Veteran's Administration Hospital. These physicians followed procedures traditionally used for evaluations for clinical competence. Petitioner examined two patients on medical service at the Veteran's Administration Hospital and Drs. Cunningham and Borreson evaluated his examinations adversely. Based on these adverse evaluations, Dr. McIntosh refused to recommend Petitioner for the certification examination. Petitioner does not contest the validity of these adverse evaluations.

Although these evaluations and Dr. McIntosh's decision not to recommend Petitioner followed Respondent's rejection of Petitioner's application to take the certification examination, Petitioner nevertheless contends that he was denied the opportunity to take the examination solely because of Dr. McIntosh's refusal to recommend him. This ignores the fact that even had Dr. McIntosh recommended Petitioner, Petitioner met none of the other requirements under Plan C. Moreover, had Petitioner been lacking only recommendation by his departmental chairman, he could have availed himself of Respondent's review procedures. It is uncontroverted that there is a provision for review by Respondent of denial of an application for certification under any plan where denial is based upon the failure of the candidate to receive the required recommendation where the candidate is otherwise qualified. However, Petitioner did not appeal to Respondent after Dr. McIntosh's refusal to recommend him under Plan C.

Petitioner contends that Plan C is a discriminatory policy against individuals whose national origins are such that they are dark complected. Plan C is applicable to similarly situated candidates regardless of national origin. The requirement of certification of clinical competence is not peculiar to Plan C but is required for all candidates for certification regardless of the particular plan through which they become eligible to take the examination.

Dr. McIntosh's refusal to certify Petitioner's clinical competence in the broad field of internal medicine did not leave Petitioner without recourse. The simple remedy was for him to acquire the training requisite under Plan C, or any other Plan, of the policies and procedures of Respondent; secure a full-time faculty position should he wish to pursue Plan C; and acquire independent evaluation of his clinical competence as provided by Respondent. Petitioner, however, elected to pursue none of these remedies.

The very purpose of Plan C of Respondent's Policies and Procedures is to provide an opportunity for medical doctors who are foreign educated and trained, or who did not engage in the traditional route of training, and have the ability and stature to qualify for admission to the examination even though their training program may have been unusual. The data submitted to the district court by Respondent regarding the number of candidates who undertook a certifying examination between 1973 and 1979 indicates that a sizable number of takers of the examination were graduates of foreign medical schools. The same data indicates that only a small portion of the graduates of foreign medical schools used Plan C, having qualified under another plan offered by Respondent. The same data indicates that, of the Plan C takers, almost all were graduates of foreign medical schools.

Plan C's sole purpose is to admit physicians with untraditional training and education routes, the majority of whom are, according to the data regarding examination takers, graduates of foreign medical schools. Not only has Respondent devised Plan C to accommodate specifically this group of physicians, but it also offers the examination in foreign locations.

While Petitioner is of Malaysian national origin and dark complected, his medical training and experience were gained in England, not a country whose inhabitants are traditionally "dark complected." It was because of the location of his education and experience, rather than the location of his place of birth, that Petitioner fell outside the traditional routes of education and training.

Numerical information proferred by Petitioner to the district court failed to establish any discriminatory impact or any discriminatory intent. The data provides no information concerning the number of foreign educated medical graduates practicing internal medicine or seeking certification in internal medicine. Moreover, there is no evidence concerning the number, if any, of

dark complected graduates of foreign medical schools who sought and were denied certification by Respondent.

The district court found that Petitioner did not meet the requirements of Plan C addressing training and full-time faculty status. Neither of these requirements has been attacked by Petitioner. The district court further found that Respondent returned Petitioner's application for admission to the certifying examination in December 1974 because Petitioner's application showed that he did not meet Respondent's requirement of training in internal medicine. The district court further found that Respondent's policies and procedures for certification and for eligibility for the certification examination are "fair, regular and neutral on their face and the preponderance of evidence does not establish that they are discriminatory in operation." Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, at A-6, Finding of Fact 27. The district court further found that Respondent was not discriminatorily motivated in devising Plan C. *Id.*

Upon review, the Fifth Circuit correctly found that, not only had Petitioner failed to establish intent as required under Section 1981, but further found that the statistical evidence cited by Petitioner was "wholly inadequate to demonstrate disproportionate impact . . . ." Petition for Writ of Certiorari, at B-3.

The Fifth Circuit further correctly found that Petitioner's appeal was frivolous and awarded Respondent costs and attorneys' fees on the appeal.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT CORRECTLY FOUND THAT PETITIONER FAILED TO ESTABLISH A *PRIMA FACIE* CASE

The rationale of the lower courts' finding intent a requisite ingredient of a cause of action premised on the Civil Rights Act of 1866, H2 U.S.C. §1981 (1976) ("Section 1981") is correct.

Runyon v. *McCrary*, 427 U.S. 160 (1976); *Washington* v. *Davis*, 426 U.S. 229 (1976). Petitioner profers no alternative appropriate standard of proof. Respondent contends, however, that Petitioner has not and cannot establish a cause of action under Section 1981.

Petitioner stipulated the following facts:[1]

> 11. Plaintiff was appointed to the Faculty of Baylor College of Medicine as Clinical Assistant Professor of Medicine in 1971-75.
>
> 12. Candidates for certification under Plan C of the Policies and Procedures of Defendant American Board of Internal Medicine must be full-time members of the faculty of a school of medicine in the United States or Canada (Exhibit 3).
>
> 13. Plaintiff has never received any monetary compensation from Baylor College of Medicine.

In addition, Petitioner admitted that his 1974 application to ABIM contained the representation that Petitioner held a teaching appointment of clinical assistant professor at Baylor College of Medicine[2] on a part-time basis. Thus, petitioner has stipulated, and the district court found, that he did not meet the ABIM requirement that Petitioner be a full-time faculty member. Petitioner does not challenge the validity of this requirement.

Petitioner further stipulated that:

> 23. In 1971, Defendant American Board of Internal Medicine advised Plaintiff that, in addition to his then-current credentials, he needed a minimum of 24 months approved additional formal training in the broad field of

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[1] Upon an Agreement among all parties, the case was presented for adjudication to the district court upon pleadings submitted, depositions filed, Stipulations of Fact and Exhibits and supporting briefs.

[2] Baylor College of Medicine has never been a party to this litigation.

internal medicine with primary patient responsibility (Exhibit 2).

24. Since 1971, Plaintiff has not been in any approved formal training program such as an internship, residency or fellowship.

* * *

28. A minimum of 36 months' postdoctoral training in internal medicine is required for certification by Defendant American Board of Internal Medicine under Plan C.

* * *

39. Plaintiff did not appeal Defendant American Board of Internal Medicine's assessment of his training deficiencies in 1971 (Exhibit 2).

40. Plaintiff did not appeal Defendant American Board of Internal Medicine's return of his application in 1974 and assessment of his training deficiencies (Exhibit 8).

Thus, Petitioner had admitted he did not meet the training requirements under Plan C. Petitioner does not challenge the validity of these requirements.

Petitioner further stipulated that he has never requested consideration under any plan for certification other than Plan C.

Thus, Petitioner has stipulated that he did not meet the minimal qualifications for admission to the certification examination. Under any theory of discrimination, Petitioner cannot establish a *prima facie* case where he admits he does not meet the valid criteria for eligibility for certification. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Mayor* v. *Educational Equality League*, 415 U.S. 605 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In addition to admitting that, even aside from the challenged requirement of recommendation of clinical competence, he was

otherwise unqualified for certification as a specialist in internal medicine, Petitioner further stipulated:

> 47. Plaintiff makes no claim that any candidates similarly situated to Plaintiff whose national origins are such that they are not dark complected received preferred treatment in connection with applications to sit for Defendant American Board of Internal Medicine's certification examination under Plan C.

This would clearly preclude any theory of recovery based on disparate treatment.

Petitioner has further admitted in Stipulations of Fact that Respondent requires certification of clinical competence of all candidates for certification, regardless of which plan for certification the candidate elects to pursue. It is clearly not a requirement unique to graduates of foreign medical schools or physicians who elect to pursue Plan C.

The district court found, and Petitioner does not contest the finding, that Petitioner did not establish that Respondent's policies and procedures for certification are discriminatory in operation. This further belies any discriminatory treatment or impact theory.

Petitioner apparently wishes to premise his case under Section 1981 on a theory of recovery similar to discriminatory impact under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (1976). *Griggs* v. *Duke Power Co., supra.* There are numerous fatal flaws with his ability to do so, however. At the threshhold, even assuming *arguendo* the recommendation of clinical competence is unlawfully discriminatory under some theory, the uncontroverted facts are that, as discussed above, Petitioner was not otherwise qualified to sit for the certification examination. Moreover, there can be no causation between the Respondent's returning Petitioner's application and Petitioner's failure to receive a recommendation of clinical competence from Dr. McIntosh where the application was returned

by Respondent in 1974, prior to the time Dr. McIntosh declined to recommend Petitioner in 1975. In addition, the district court found that Petitioner's application was returned by Respondent "because his application showed that he did not meet the ABIM's requirements of 36 months of approved formal training in internal medicine."

The "statistical" evidence proferred by Petitioner fails to show any valid qualified pool of physicians eligible for and desirous of ABIM certification. *Mayor* v. *Educational Equality League*, 415 U.S. 605 (1974). Indeed, the statistics are addressed to events concerning graduates of foreign medical schools rather than physicians of a particular national origin or race or color. These "statistics" do not address any time period relevant to any issue in this action. In addition, many of the statistics do not differentiate between physicians and board-eligible physicians or between physicians interested in becoming certified in internal medicine as opposed to some other specialty.

The reliability of the proferred data has never been established. Petitioner's "statistics" are merely data gleaned from two articles cited as Lerner, *Manpower Issues and Voluntary Regulation in the Medical Specialty System* (1974) and Schwartz, "Minorities in American Medicine," *Private Practice* (March 1980). The source, reliability and context of these statistics was never presented and remains unknown. Petitioner has not produced any information concerning the number of dark-complected graduates of foreign medical schools seeking certification by Respondent, under which plan certification was sought and/or for what reason(s) certification was denied.

In addition to problems concerning the appropriate standard of proof, Petitioner confronts and cannot circumvent several jurisdictional hurdles. Petitioner has failed to establish a claim based on discrimination proscribed by Section 1981.

It is clear that Section 1981, insofar as it reaches private action, is limited to claims of racial discrimination in the making

of contracts. *McDonald* v. *Sante Fe Transportation Co.*, 427 U.S. 271 (1976); *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Petitioner here has not stated any claim of racial discrimination against ABIM. Petitioner merely asserts that Plan C can be discriminatorily applied because certain departmental chairmen of medical schools, for and over whom ABIM has no legal responsibility, might discriminatorily apply Plan C to deny "dark skinned" persons of unspecified national origin the right to take the examination.

Petitioner has not alleged and cannot establish that the challenged portion of Plan C constitutes a "contract" as required by Section 1981. Under the principles of contract law, the offer extended by Plan C is conditional. It specifies certain conditions and makes promises based on the fulfillment of these conditions. The offer is extended to departmental chairmen to provide a means by which they can secure certification for full-time faculty members. The offer does not run to the faculty member himself and it is of no avail for Petitioner to contend that his Departmental Chairman failed and refused to "accept" the "offer" of Plan C for a discriminatory reason, thereby establishing some cause of action against Respondent ABIM. ABIM has not by or through Plan C refused or failed to make a contract with Petitioner on the basis of race or on any other basis.

Finally, Petitioner's claims under Section 1981 are clearly time-barred. Petitioner's training deficiencies were assessed and Petitioner was notified in September 1971. Moreover, Petitioner received a copy of the ABIM Policies and Procedures in September 1971 and was thus cognizant of Plan C and its applicability to him. This knowledge gave rise to whatever cause of action Petitioner had. *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). The applicable Texas statute of limitations is two years. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1980). *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641,

647-48 (5th Cir. 1974). The instant suit was not instituted until September 1976.

II.

THE FIFTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN AWARDING RESPONDENT ATTORNEYS' FEES ON APPEAL

The undisputed facts and circumstances of this suit clearly establish that ABIM is entitled to an award of attorneys' fees for the time and effort expended in connection with the defense of Petitioner's claims. *Christianburg Garment Co.* v. *E.E.O.C.*, 434 U.S. 412 (1978); *Lopez* v. *Aransas Cty. Ind. Sch. Dist.*, 470 F.2d 541 (5th Cir. 1978). Petitioner did not even plead the essential requirements of a cause of action.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied and Respondent should be awarded appropriate attorneys' fees and costs as damages in this appeal.

Respectfully submitted,

By A. Harper II

A. J. HARPER II

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